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No. 5741

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,  
*Appellant,*  
*vs.*  
SOUTHERN PACIFIC COMPANY,  
*Appellee.*

Transcript of Record

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Appeal From the United States District Court for the  
Southern District of California,  
Northern Division.

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FILED

FEB 27 1929

PAUL P. O'BRIEN,  
CLERK



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# I N D E X

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(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.)

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NAMES AND ADDRESSES OF ATTORNEYS

*For Appellant:*

SAMUEL W. McNABB,  
*United States Attorney,*

HARRY GRAHAM BALTER,  
*Assistant United States Attorney,*

Federal Building,  
Los Angeles, California.

*For Appellee:*

L. L. CORY,  
Cory Building,  
Fresno, California.

## CITATION

No. 409-H

UNITED STATES OF AMERICA—SS.

*To Southern Pacific Company—Greeting:*

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 1st day of March, A. D. 1929, pursuant to and order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause where you are defendant in error and the United States of America is plaintiff in error, and you are hereby required to show cause, if any there be, why the judgment rendered in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable United States District Judge for the Southern District of California, this 4th day of February, A.D. 1929, and of the Independence of the United States, the one hundred and fifty-third.

EDWARD J. HENNING,  
*U. S. District Judge for the Southern  
District of California.*

Service of the foregoing citation admitted by copy this 6th day of February, 1929. L. L. Cory, Attorney for Defendant.

(Endorsed): Filed Feb. 11, 1929. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.



IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA, NORTHERN  
DIVISION.

THE UNITED STATES OF AMERICA,  
*Plaintiff,*

*vs.*

SOUTHERN PACIFIC COMPANY,  
*Defendant.*

No. 409-H

COMPLAINT.

Now comes the United States of America, by Samuel W. McNabb, United States Attorney and Ignatius F. Parker, Assistant United States Attorney, for the Southern District of California and brings this action on behalf of the United States against the Southern Pacific Company, a corporation, organized and doing business under the laws of the State of Kentucky, and having an office and place of business at Merced, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903, (contained in 32 Statutes at Large, page 943), defendant, on April 18, 1928, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: W. P. box No. 15107.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad from Merced, in the State of California, toward Tracy, in said State, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling lever keeper on said end of said car being incorrectly applied, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said de-

fendant in the sum of One Hundred dollars and its costs herein expended.

SAMUEL W. McNABB,  
Samuel W. McNabb,  
*United States Attorney.*

IGNATIUS F. PARKER,  
Ignatius F. Parker,  
*Assistant United States Attorney.*

(Endorsed): Filed Jun 2, 1928. R. S. Zimmerman,  
Clerk. By Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H.

ANSWER

Comes now the defendant above named and for its answer to plaintiff's complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

This answering defendant denies each and every allegation contained in plaintiff's complaint wherein it is alleged that this defendant violated the provisions of the Safety Appliance Act with respect to W. P. Box car No. 15107, and specifically denies each and every allegation with respect thereto.

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of its action, and that it be discharged with its costs.

W. I. GILBERT,  
W. I. Gilbert,  
*Attorney for Defendant.*

(Duly verified):

(Endorsed): Filed Jun 25 1928. R. S. Zimmerman,  
Clerk. By L. J. Cordes, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

NOTICE OF SUBSTITUTION OF ATTORNEYS.

*To the Plaintiff above named, and to Samuel W.  
McNabb, U. S. Attorney, and Ignatius F. Parker,  
Assistant U. S. Attorney:*

You will please take notice that we have hereby substituted L. L. CORY, Esquire, in the place and stead of W. I. GILBERT, Esquire, as our attorney in the above entitled action.

Dated: November 5th, 1928.

SOUTHERN PACIFIC COMPANY,

By GUY V. SHOUP

*General Solicitor.*

I hereby agree to said substitution.

Dated: October 31, 1928.

W. I. GILBERT

W. I. Gilbert

I hereby accept said substitution.

Dated: November 10th, 1928.

L. L. CORY.

(Endorsed): Filed Nov 12 1928. R. S. Zimmerman,  
Clerk. By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 409-H

FINDINGS OF FACT  
and  
CONCLUSIONS OF LAW

This cause coming on for trial before the Court at Fresno, at the November, 1928, term, to-wit: on the 26th day of November, 1928, evidence being introduced by the respective parties, and arguments heard thereon, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

On April 18, 1928, defendant, a common carrier engaged in interstate commerce, operated on its line of railroad from Merced, California, toward Lathrop, California, over a highway of interstate commerce, its certain freight train known as Extra West 1722, containing 40 or more cars, one of which was Western Pacific Box Car 15107.

At the time said car was moved out of Merced, and for a little over an hour prior thereto, the coupling and uncoupling apparatus on its "A" end was out of repair and inoperative in the manner alleged in plaintiff's complaint.

CONCLUSION OF LAW.

Defendant violated the Safety Appliance Act in so hauling said defective car out of Merced, California, for which action it is liable to plaintiff for the statutory

penalty of \$100.00, and judgment shall be entered accordingly.

EDWARD J. HENNING,  
*United States District Judge.*

Fresno, California

November 27, 1928.

(Endorsed): Filed Nov 28 1928. R. S. Zimmerman,  
Clerk. By Francis E. Cross, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

### J U D G M E N T

This cause coming on for trial before the Court at Fresno, at the November, 1928, term, to-wit: on the 26th day of November, 1928, the parties hereto, by their written stipulation duly filed having waived trial by jury, the plaintiff being represented by Samuel W. McNabb, United States Attorney, Harry Graham Balter, Assistant United States Attorney, for the Southern District of California, and M. C. List, Special Assistant to the United States Attorney, the defendant being represented by L. L. Cory, evidence having been introduced by plaintiff and defendant, arguments having been heard in support of motions for judgment in favor of the respective parties, and the Court, after consideration thereof, having found the issues in favor of plaintiff and against the defendant:

IT IS ORDERED that judgment shall be and the same is hereby entered in favor of plaintiff and against defendant

in the sum of \$100.00, together with costs amounting to \$17.00, a total of \$117.00.

IT IS FURTHER ORDERED that the judgment herein entered for the statutory penalty of \$100.00 may be and hereby is suspended, and that said judgment for said \$100.00 shall be entered by the Clerk as satisfied upon the payment of the aforesaid costs:

IT IS FURTHER ORDERED that the plaintiff may be allowed an exception to the action of the Court in so suspending said judgment as to \$100.00 and in ordering it satisfied upon the payment of said costs.

EDWARD J. HENNING,  
*United States District Judge.*

Fresno, California.

November 27, 1928.

Judgment entered November 28th, 1928. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

(Endorsed): Filed Nov 27 1928. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk

Dock and Ent. 11/28/28 indexed same date.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

ASSIGNMENT OF ERRORS.

NOW comes the plaintiff by Samuel W. McNabb, United States Attorney for the Southern District of California, and Harry Graham Balter, Assistant United States Attorney for the said district, and in connection with its Petition for Appeal says that in the record,

proceedings and in the final judgment in the above entitled action manifest error has intervened to the prejudice of the plaintiff, to-wit:

## I.

That the judgment as entered herein in this action is contrary to law and erroneous in that it provides that the payment of the statutory penalty of \$100.00 entered in the same judgment in favor of the plaintiff and against the defendant was erroneously suspended.

## II.

That the court erred in providing that the judgment in favor of the plaintiff for said \$100.00 shall be entered by the clerk as satisfied upon payment of the costs.

## III.

That the said judgment is inconsistent within itself and is contrary to law, by reason whereof plaintiff prays that the judgment herein be corrected to the extent that that portion thereof suspending payment of the statutory penalty of \$100.00 and ordering that the same be satisfied upon payment of costs be stricken therefrom.

Dated this 20 day of December, 1928.

SAMUEL W. McNABB,

*United States Attorney.*

HARRY GRAHAM BALTER,

Harry Graham Balter,

*Assistant U. S. Attorney,*

*Attorneys for Plaintiff.*

I hereby certify that the foregoing Assignment of Errors is made in behalf of the plaintiff hereinabove named, for an appeal and is in my opinion, and the same



now constitutes the Assignment of Errors upon the appeal prayed for.

HARRY GRAHAM BALTER,  
Harry Graham Balter,  
*Assistant U. S. Attorney.*

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman,  
Clerk. By Edmund L. Emith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

PETITION FOR APPEAL.

*To the Honorable Edward J. Henning, Judge of the  
Above Entitled Court:*

NOW COMES the plaintiff, United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, and Harry Graham Balter, Assistant United States Attorney for the said District, and feeling itself aggrieved by the final judgment entered in this cause hereby prays that an Appeal may be allowed, to-wit: from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, Petitioner hereby presents its Assignment of Errors.

SAMUEL W. McNABB,  
*United States Attorney.*

HARRY GRAHAM BALTER,  
Harry Graham Balter,  
*Assistant U. S. Attorney,*  
*Attorneys for Plaintiff.*

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman,  
Clerk. By Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

ORDER FOR APPEAL.

IT IS HEREBY ORDERED that the Appeal prayed  
for in the Petition for Appeal in the above entitled case  
be allowed.

EDWARD J. HENNING,  
*United States District Judge for the Southern District of  
California.*

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman,  
Clerk. By Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

STIPULATION.

IT IS STIPULATED by and between the respective  
counsel in the above entitled action that in the printing  
of the Transcript on Appeal herein the title of the court  
and the title of the cause and the captions on the plead-  
ings and documents, may be indicated thus (title of Court  
and Cause), and need not be printed in full, and that

the endorsements on such papers and documents except the filing endorsements, may also be omitted.

SAMUEL W. MCNABB,  
*United States Attorney.*

HARRY GRAHAM BALTER,  
Harry Graham Balter,  
*Assistant United States Atty.,*  
*Attorneys for Plaintiff.*

L. L. CORY,

L. L. Cory,

*Attorney for Defendant.*

APPROVED this 12th day of February, 1928.

EDWARD J. HENNING,

*Judge for the Southern District of California.*

(Endorsed): Filed Feb 12 1929. R. S. Zimmerman,  
Clerk. By Francis E. Cross, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 409-H

PRAECIPE.

*To the Clerk of Said Court.*

*Sir:*

Please prepare and certify copy of such papers filed and proceedings had in the above entitled action as are necessary to a determination of the cause on appeal and in particular as follows:

1. Complaint.
2. Answer to Complaint.
3. Notice of Substitution of Attorneys.
4. Findings of Fact and Conclusions of Law.

5. Judgment.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Citation on Appeal.
10. Stipulation and Order.
11. And this Praeceptum.

SAMUEL W. McNABB,  
*United States Attorney.*

HARRY GRAHAM BALTER,  
Harry Graham Balter,

*Assistant United States Attorney,*

(Endorsed): Received copy of within PRAECIPE this 6th day of February 1929. L. L. Cory, Attorney for Defendant. Filed Feb 11 1929. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

## CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 16 pages, numbered from 1 to 16 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of:

1. Complaint.
2. Answer to Complaint.
3. Notice of Substitution of Attorneys.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Citation on Appeal.
10. Stipulation and Order for Diminution of Record,  
and
11. Praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of February, in the year of our Lord one thousand nine hundred

twenty-nine, and of our Independence the one hundred fifty-third.

(SEAL)

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By.....Deputy Clerk.